identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

B5

[redacted]

FILE: SRC 07 020 51440 Office: TEXAS SERVICE CENTER Date: DEC 04 2007

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a vibration control products (sales, marketing, engineering and development) company. It seeks to employ the beneficiary permanently in the United States as a CAE/Simulation Engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel notes that the petitioner paid the beneficiary nearly the proffered wage in 2005, the year at issue which was a difficult year for the petitioner's industry, and asserts that such payments demonstrate that it is more likely than not that the petitioner will be able to pay the full proffered wage once the beneficiary adjusts to lawful permanent resident status. Counsel's assertions are not persuasive in light of the discrepancies discussed below, including those between the wages listed on the petitioner's final quarterly payroll record for 2005 and the amount of wages listed on the petitioner's 2005 tax return. Also, the evidence submitted on appeal raises a new successor-in-interest issue that is not adequately resolved.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

While counsel asserts that the ability to pay the proffered wage is "prospective," the regulation quoted above, 8 C.F.R. § 204.5(g)(2), clearly states that the employer must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing." *See also Matter of Great Wall,* 16 I&N Dec. 142, 144-45 (Act. Regl. Commr. 1977). The priority date in this matter is the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 22, 2004. The proffered wage as stated on the Form ETA 750 is $73,665 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of May 2001.

On the petition, the petitioner claimed to have an establishment date in 2000. The petitioner did not list its own gross annual income, net income or number of employees. In support of the petition, the petitioner submitted a cover letter affirming the employment of two employees; Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns, without schedules, for 2004 and 2005 and the 2004 annual report of the petitioner's parent corporation. The IRS Forms 1120 reflect large net losses in both years and indicate that the petitioner was established in 1995, not 2000 as stated on the petition. The parent corporation showed a net loss in 2004.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on November 2, 2006, the director issued a notice of intent to deny the petition. The director asserted that the record lacked the petitioner's Schedules L for 2004 and 2005, quarterly wage reports and the beneficiary's Forms W-2 Wage and Tax Statements.

In response, the petitioner submitted the requested evidence, payroll records and the beneficiary's 2005 Form 1099-MISC. These documents indicate that the petitioner paid the beneficiary $71,700 in 2004 and $73,500 in wages in 2005 plus an additional $3,600 in miscellaneous income. The Schedules L reflect that the petitioner's current assets exceeded its current liabilities by $1,004,153 in 2004 but that its current liabilities exceeded its current assets in 2005. Finally, the petitioner submitted a shareholder resolution whereby one of the shareholders agreed to convert a $1,000,000 loan to a capital investment at the end of 2005. This resolution is consistent with the 2005 Schedule L, which reflects a reduction in long-term loans of more than $1,000,000 and $1,000,000 in new additional paid-in-capital. Thus, the resolution itself does not add anything to the record that was not already apparent from the petitioner's tax return. Significantly, despite this conversion of debt to equity, the petitioner's current liabilities still exceeded its current assets at the end of 2005.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage in 2005 and, on December 1, 2006, denied the petition.

On appeal, counsel asserts that the director erred in failing to consider the shareholder resolution. As stated above, counsel further asserts that the petitioner paid the beneficiary only $165 less than the proffered wage in 2005 and, given the small nature of this amount, should be presumed to be able to pay the difference. Counsel also asserts that the petitioner has a large parent corporation that can be expected to contribute to the proffered wage. The petitioner resubmits previously submitted evidence. In addition, counsel asserts that the petitioner recently merged with [redacted] and became one entity under that name. The petitioner submits an affidavit from the Vice President of that company affirming that the new company "assumed all assets and liabilities" of the petitioner. The petitioner did not submit the actual merger agreement.

If the petitioner is purchased, merges with another company, or is otherwise under new ownership, the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. *See Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481, 482 (Commr. 1986). It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. *Id.* While we

do not question the credibility of the Vice President, the actually merger agreement would be more persuasive than the affidavit submitted.

The only year that the director questioned the petitioner's ability to pay the proffered wage is 2005. Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2005. As noted by counsel, the difference between the wages paid, as reflected on the Form W-2, and the proffered wage is $165. As will be discussed below, however, the record contains discrepancies regarding the total wages paid out by the petitioner in 2005.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The tax returns reflect the following information for 2005:

Net income (loss)	($1,135,910)
Current Assets	$806,111
Current Liabilities	$863,524
Net current assets	($57,413)

The petitioner has not demonstrated its ability to pay the difference between the wages paid and the proffered wage in 2005 out of its net income or net current assets.

While we acknowledge that the difference between the proffered wage and the wages actually paid is small, we know of no legal authority that sets the amount of difference between the two that can be ignored as de minimus. Moreover, we cannot ignore that the petitioner suffered a huge loss in 2005 and had incurred significant current liabilities. Contrary to counsel's implication on appeal, this loss has not been demonstrated as within the context of several successful years. In fact, the only other year for which tax returns were provided was 2004, where the petitioner suffered a net loss of $421,855, not as large as in 2005 but still a considerable amount.

In addition, we will not presume the parent company's willingness to cover the proffered wage. The petitioner did not submit a binding agreement whereby the parent company took on such an obligation. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631, 633 (Act. Assoc. Comm. 1981); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530, 531 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24, 50 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Moreover, the petitioner has not demonstrated the parent corporation's ability to pay the proffered wage. It suffered a loss in 2004, the only year for which financial information has been provided, and its liabilities are not divided into current and long-term liabilities, making it difficult to determine the parent company's net current assets.

While neither the petitioner nor counsel has ever raised this document, we note that the record contains a Form 1099 issued to the beneficiary in 2005 in addition to the Form W-2. The Form 1099 reflects that in 2005, the petitioner paid the beneficiary $3,600 in miscellaneous income in addition to the

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

$73,500 in wages reflected on the Form W-2. While this additional amount would cover the $165 difference between the proffered wage and the wages paid in 2005, the Form W-2, quarterly reports, payroll records and Form 1099 are not consistent with the petitioner's 2005 tax return.

The petitioner's 2005 fourth quarter payroll records reflect year-to-date earnings for all seven employees as $213,300 and total compensation for all employees as $217,297. The petitioner's 2005 tax return, however, reflects total wages of only $117,776 and no additional cost of labor (on Schedule A). Moreover, while 2005 fourth quarter payroll records list some employees as having receiving year-to-date "other comp[ensation]," no such compensation is listed for the beneficiary. Rather, the $73,500 provided on the Form W-2 is the total compensation listed. Thus, the $3,600 on the Form 1099 is not accounted for on the fourth quarter payroll records. Moreover, even the $73,500, as part of the $213,300 in wages paid by the petitioner in 2005 according to the end of year payroll records, is inconsistent with the total wages listed by the petitioner on its 2005 tax return.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* Without a resolution of the inconsistencies discussed in the preceding paragraph, we cannot conclude that the petitioner actually paid the beneficiary the $77,100 listed on the Forms W-2 and 1099 and, thus, has demonstrated its ability to pay that compensation. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.